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EARTH ISLAND INSTITUTE v. UNITED STATES FOREST SERVICE: CUTTING DOWN ON LOGGING PROPOSALS — A SUCCESSFUL CHALLENGE

I. INTRODUCTION

Since the mid-1980s, the amount of acreage burned by wildfires has escalated, reversing a decades-long decline.¹ This trend has caused a clash between the United States Forest Service (Forest Service) and environmental groups concerning how best to reduce the risk of forest fires in an effort to protect our national forests and wildlife.² On the one hand, Forest Service rangers advocate the commercial sale of timber from national forests to remove debris and thin aging stands and to reconcile costs of noncommercial thinning.³ These thinning proposals typically focus on the removal of large, mature trees known as old-growth trees.⁴ On the other hand, environmental groups contend commercial logging does more to destroy the environment than to restore it.⁵ While there is agreement that, to a certain extent, fire is beneficial, the tension between the two groups is partially due to a distrust of an earlier generation Forest Service that admits it was slow to adopt environ-

1. See Paul Trachtman, *Fire Fight: With Forests Burning, U.S. Officials Are Clashing with Environmentalists over How Best to Reduce the Risk of Catastrophic Blazes*, SMITHSONIAN, Aug. 2003, at 46 (estimating that seven million acres burned in 2002, up from four million in 1987, costing federal government \$1.6 billion and requiring deployment of 30,000 firefighters to contain wildfires).

2. See generally *id.* (describing conflict between Forest Service and environmental groups over best way to manage national forests and reduce risk of wildfires).

3. See *id.* at 46-47, 51 (explaining view held by Forest Service that timber sales are beneficial to growth and preservation of national forests). A "stand" is a defined area of forest uniform in species, composition or age that can be managed as a single unit. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1295 (9th Cir. 2003).

4. See René Voss, *Getting Burned By Logging: Logging Industry Misrepresents Environmentalists' Role in Forest Fires*, THE BALTIMORE CHRONICLE & SENTINEL, July 3, 2002, available at http://www.baltimorechronicle.com/firelies_jul02.shtml (noting budgets of commercial loggers are dependent on sale of valuable mature trees). Commercial thinning leaves behind twigs and other limbs, causes swift growth of flammable shrubs and reduces forest cover which would otherwise create cool shade, thereby creating hotter, drier conditions on the ground. See *id.* Large trees are defined as those that are at least twelve inches in diameter. See Chad Hanson, *Thinning Mature Trees Ups Fire Risk*, THE UNION, Aug. 25, 2001, at A6.

5. See Trachtman, *supra* note 1, at 52 (explaining timber sales frequently focus on removal of beneficial timber rather than on timber that poses threat to speed and intensity of wildfires).

mental laws, and thus, endorsed commercial logging proposals disguised as hazardous fuel treatments.⁶

This tension has since carried over and strong disagreement remains over forest management even within the Forest Service; some personnel agree with environmentalists that smaller undergrowth, or ground fuels, as opposed to old-growth trees, should be reduced to help prevent severe wildfires.⁷ This is explained by ladder fuels—vegetation that allows a fire to move from lower fuels into higher fuel layers.⁸ Flames from fuels at the ground level, such as pine needles, can be carried into taller fuels, i.e., shrubs, which can ignite still taller fuels, such as tree branches.⁹ Thus, it is necessary to reduce ladder fuels and any accumulation of ground fuels to decrease the intensity and severity of a wildfire.¹⁰ Consequently, only those logging proposals that focus on old-growth trees are the ones environmentalists challenge because this type of logging increases the frequency and gravity of wildfires which, in turn, severely impacts the habitats of certain animal species.¹¹

In January 2001, the Sierra Nevada Framework (Framework) was published which is a comprehensive forest conservation strategy for all eleven national forests in the Sierra Nevada mountain range, including the Eldorado National Forest.¹² The Framework places limitations on logging in certain areas to protect the habitat of particular animal species, namely, the California spotted owl.¹³ In late

6. See Voss, *supra* note 4 (noting proposals for commercial logging continue, even with overwhelming evidence that this type of logging is more of problem than solution). Earlier generation Forest Service personnel admit to the concealment of facts to gain support for their various logging proposals. See *id.*

7. See Hanson, *supra* note 4, at A6 (noting small undergrowth is anything less than four inches in diameter according to Denny Truesdale, U.S. Forest Service). Furthermore, the Forest Service's own National Fire Plan finds that "removal of large, merchantable trees from forests does not reduce fire risk and may, in fact, increase such risk." *Id.*

8. See *Fuels Management*, UNITED STATES FOREST SERVICE (Sept. 2001), <http://www.fs.fed.us/r5/eldorado/fire/fuels/index.html> (defining forest fuels).

9. See *id.* (describing how various forest fuels contribute to spread of wildfires).

10. See *id.* (explaining how forest fuels contribute to spread of wildfires but noting fire is essential and allows return of nutrients to soil).

11. See *id.* (noting disconnect commercial logging companies and environmentalists); see also Hanson, *supra* note 4, at A6 (explaining reduction of large, mature forest cover increases wind which then causes fires to burn more severely and spread more quickly).

12. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1296 (9th Cir. 2003) (describing forest plan for Sierra Nevada mountain range).

13. See *id.* (describing areas known as Old Forest Emphasis Areas, Home Range Core Areas (HRCAs) and Protected Activity Centers (PACs) where logging is severely restricted in order to protect, *inter alia*, California spotted owl).

August 2001, a large wildfire (Star Fire) broke out, consuming thousands of acres in both the Eldorado National Forest and the Tahoe National Forest.¹⁴ Over the next year, in response to the Star Fire, the Forest Service implemented a restoration project involving the sale of timber which formed the subject of the appeal in *Earth Island Institute v. United States Forest Service*.¹⁵

In *Earth Island*, Earth Island Institute (Earth Island) sought a preliminary injunction against the implementation of two timber salvage sales recommended in the Final Environmental Impact Statement (EIS) issued by the Forest Service.¹⁶ Earth Island argued that the sales violated procedural requirements of both the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA).¹⁷ The United States District Court for the Eastern District of California denied Earth Island's request for an injunction.¹⁸ On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded the case, holding that Earth Island demonstrated a "reasonable probability of success on the merits" for several of their claims, and that the lower court applied an erroneous legal standard for irreparable harm.¹⁹

This Note is about the ongoing struggle between environmental groups and the Forest Service concerning how to best protect our national forests. Section II discusses the numerous claims Earth Island alleged against the Forest Service in violation of NEPA and NFMA.²⁰ Next, Section III sets out general background law, detailing the various foundational statutory and case law precedents guiding forest preservation in the Sierra Nevada range.²¹ Section IV analyzes the Ninth Circuit's determination that injunctions will

14. See *id.* at 1295 (noting fire swept through two national forests and some private lands).

15. See *id.* (detailing history of forest management plan).

16. See *id.* (challenging logging proposals).

17. See *Earth Island*, 351 F.3d at 1296 (challenging logging proposals); see generally National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000) [hereinafter NEPA]; see generally Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. § 1600 (2000) [hereinafter NFMA].

18. See *Earth Island*, 351 F.3d at 1297 (holding Plaintiffs were unlikely to succeed on their challenges to Forest Service methodology and data because agencies are entitled to rely upon their own methodology and experts).

19. See *id.* (finding district court's conclusion that Earth Island failed to show "concrete probability of irreparable harm" is improper legal standard and, thus, an abuse of discretion).

20. See *id.* For a discussion of the claims brought against the Forest Service, see *infra* notes 38-45 and accompanying text.

21. For a discussion of the background precedent guiding forest preservation, see *infra* notes 46-89 and accompanying text.

be favored when injury to the environment is likely.²² Section V evaluates the Ninth Circuit's reasoning and decision to overturn the lower court.²³ Finally, Section VI of this Note considers the impact *Earth Island* and recent legislation will have on logging in national forests ravaged by wildfires and the need for strict implementation of preservation guidelines so that millions of Americans can enjoy our national forests and wildlife for years to come.²⁴

II. FACTS

By the time it was extinguished in September 2001, the Star Fire had consumed thousands of acres in the Eldorado National Forest of the Sierra Nevada Mountains.²⁵ Immediately after the fire, the Forest Service prepared a Burned Area Emergency Rehabilitation (BAER) report in conjunction with an EIS, assessing the damage to the forest.²⁶ After public comment, the Forest Service released the Final EIS.²⁷ Its objective was to avoid another "stand replacing" fire by removing dead trees and preventing the development of "excessive woody debris."²⁸ The Final EIS also aimed to prevent soil erosion by promoting ground cover and saving down logs for the use of dependent animal species, while at the same time, capitalizing on the pecuniary value of dead trees through logging.²⁹ The Final EIS recommended the removal of all but four to eight large dead trees per acre in general forest areas with greater

22. For a discussion of the court's holding, see *infra* notes 99-137 and accompanying text.

23. For a discussion of the court's analysis, see *infra* notes 138-69 and accompanying text.

24. For a discussion of the impact of the court's decision, see *infra* notes 170-82 and accompanying text.

25. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1295 (9th Cir. 2003) (describing Star Fire).

26. See *id.* (explaining BAER report and EIS results differed in terms of assessed burn damage). The BAER report estimated 11% of the forest had experienced high fire intensity, 57% experienced moderate intensity and 32% low intensity. See *id.* In contrast, the EIS estimated 35% of the forest experienced high intensity burns, 45% moderate intensity, and 18% low intensity, leaving only 2% of the forest untouched. See *id.* Plaintiffs dispute the findings in the second report. See *id.* at n.1.

27. See *id.* at 1295 (noting Draft EIS published in March 2002 proposed logging 1714 acres of forest using helicopter, tractor and skyline methods). The Final EIS released in June 2002 proposed this same action. See *id.*

28. See *id.* (describing objective of Final EIS). For further discussion about stands, see *supra* note 3 and accompanying text.

29. See *Earth Island*, 351 F.3d at 1295 (noting 71% of Star Fire area had encountered "high severity burn," according to Forest Service entomologist Sherri Smith). Smith also determined that trees with 35% green canopy or less were

than fifty percent tree mortality and in Old Forest Emphasis Areas with more than seventy-five percent tree mortality, without any limitation on tree diameter.³⁰

Additionally, over the course of the year, the Forest Service implemented a conservation strategy designed to rehabilitate and restore the burned area and assess the environmental impact, as prescribed under the Framework.³¹ The Framework mandates the establishment of 300-acre Protected Activity Centers (PACs) around known or suspected California spotted owl nesting sites and severely restricts logging in these areas.³² The Framework also calls for 1000-acre Home Range Core Areas (HRCAs) around each PAC to further protect the zones presumed to have the most concentrated spotted owl activity.³³ The PACs are required to be “maintained regardless of California spotted owl occupancy status, unless [their] habitat is rendered unsuitable by a catastrophic stand-replacing event and surveys conducted to protocol confirm non-occupancy.”³⁴ Furthermore, should a fire destroy a PAC, the Framework compels the Forest Service to attempt to relocate the PAC to another area within the HRCA.³⁵

Here, the Forest Service surveyed PAC055 and PAC075, two Eldorado Forest PACs within the Star Fire area, and concluded that only 4% of PAC055 and 13% of PAC075 were at less than 75% tree mortality per acre.³⁶ Additionally, only 5% of PAC055 HRCA and 18% of PAC075 HRCA remained at less than 75% mortality, ena-

dead, based on scientific literature, Forest Service data and cambium sampling. *See id.* Cambium is a formative tree layer that produces new cells. *See id.* at 1296 n.2.

30. *See id.* at 1296 (describing this as preferred alternative of Final EIS). Old Forest Emphasis Areas are managed with the same logging restrictions as HRCAs, both of which are designed to protect, *inter alia*, the California spotted owl. *See id.*

31. *See id.* at 1295-96 (describing that Sierra Nevada Framework, published in 2001, established conservation strategy for all eleven national forests in Sierra Nevada Mountain Range). The Framework includes limitations on logging in specific zones of the forest. *See id.*

32. *See id.* (explaining California spotted owl is not currently endangered species). When the Final EIS was published, the U.S. Fish and Wildlife Service classified the species as “sensitive,” but determined that the species did not compel additional protection under the Endangered Species Act. *See id.*

33. *See id.* at 1296 (adding further that within both these areas and PACs, trees with diameters greater than twelve inches may not be removed, though trees of slightly larger girth may be thinned in certain circumstances to “address imminent hazards to human safety”).

34. *See id.* (detailing stringent requirements of Sierra Nevada Framework regarding PACs).

35. *See Earth Island*, 351 F.3d at 1296 (noting exception to Framework requirement that PACs must be maintained).

36. *See id.* at 1296-97 (relying on Smith’s mortality guidelines estimates).

bling the Forest Service to conclude in its Final EIS that relocation of the PAC within the HRCA was not possible.³⁷

Accordingly, in August 2002, nearly one year after the wildfire, the Forest Service Supervisor adopted an amended Final EIS which concluded that both PACs should be dropped.³⁸ Earth Island filed an administrative appeal against this decision, but the Forest Service affirmed its decision the following month.³⁹ Consequently, the Forest Service divided the area in the Eldorado National Forest into two timber salvage sales.⁴⁰ Earth Island challenged this decision in federal district court and requested a preliminary injunction.⁴¹ Earth Island argued that the Forest Service had violated procedural requirements imposed by NEPA and NFMA.⁴² The district court awarded a temporary injunction on October 3, but on October 11 the court denied Earth Island's request for a preliminary injunction, finding that Earth Island was "unlikely to succeed on challenges to the Forest Service methodology and data because agencies are entitled to rely upon their own methodology and experts."⁴³ Furthermore, the court determined that Earth Island failed to establish that the timber sales would result in "irreparable harm" to the California spotted owl or that the "balance of hardships" tipped in Earth Island's favor.⁴⁴ Earth Island appealed this decision to the United States Court of Appeals for the Ninth Cir-

37. See *id.* (relying on same data); see also *id.* at 1304-05 (explaining Plaintiff's argument that, because location of PAC075 is along border of both Eldorado National Forest and Tahoe National Forest, and Tahoe National Forest has a PAC on its side with the same number, the entire PAC075 should be considered as a single area subject to single EIS, contrary to Forest Service's argument contending that the two regions were numbered identically but managed separately, thus permitting separate EIS for each).

38. See *id.* at 1297 (describing plan that Forest Service Supervisor John Berry approved was modified so no trees with green canopy would be removed from partially burned stands within former PACs and that cambium sampling should not be used because of its relative inefficiency).

39. See *id.* (explaining final administrative appeal broadened restriction on removal of trees with green canopy to those within Old Forest Emphasis Areas).

40. See *Earth Island*, 351 F.3d at 1297 (adding that Forest Service awarded the contracts to Sierra Pacific Industries).

41. See *id.* (challenging logging proposals).

42. See *id.* (explaining because logging was to begin immediately, Plaintiffs also requested temporary restraining order on October 1 against logging trees with any green canopy remaining). The court permitted Sierra Pacific Industries to intervene on behalf of the Forest Service. See *id.*

43. See *id.* (holding Forest Service took "hard look" at environmental impact raised by restoration project and there was no abuse of discretion in preparing separate EIS for each national forest).

44. See *id.* (indicating no preliminary injunction would issue).

cuit, which reversed the district court's decision and remanded the case for further proceedings.⁴⁵

III. BACKGROUND

A. Preliminary Injunctive Relief

Certain established criteria must be met for a grant of preliminary injunction.⁴⁶ The Ninth Circuit identified two sets of criteria for preliminary injunctive relief in *Johnson v. California State Board of Accountancy*.⁴⁷ The traditional criteria requires that a plaintiff show: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)."⁴⁸ Alternatively, a court may grant injunctive relief if it finds that the moving party "demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in [the moving party's] favor."⁴⁹

1. Irreparable Injury

The Supreme Court declared that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable" when it decided *Amoco Production Co. v. Village of Gambell*.⁵⁰ In *Amoco*, two Alaskan Native villages sought injunctions to prohibit exploratory oil drilling, claiming that the Secretary of the Interior had not complied with the Alaska National Interest Lands Conser-

45. See *Earth Island*, 351 F.3d at 1297 (overturning district court's denial of injunctive relief).

46. See *id.* at 1297-1300 (challenging district court's interpretation of preliminary injunctive relief).

47. 72 F.3d 1427, 1430 (9th Cir. 1995) (defining traditional and alternative sets of criteria, either of which must be met before grant of preliminary injunctive relief).

48. See *id.* (citing *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985)) (detailing "traditional" set of criteria).

49. See *id.* (emphasis in original) (citing *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984)) (describing second set of criteria, explaining that as hardship becomes greater and degree of irreparable injury increases, probability of success on merits decreases but minimum is at least needed for "fair" chance of success on merits).

50. 480 U.S. 531, 545 (1987) (rejecting presumption of irreparable injury when agency fails to thoroughly evaluate environmental impact of proposed action, but noting that balance of harms will usually favor injunction to protect environment).

vation Act.⁵¹ The Supreme Court held that injury was not at all probable and therefore denied injunctive relief.⁵² The Court elaborated that if injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.⁵³ Consequently, several courts have since held that commercial logging plans alone may fulfill the irreparable harm requirement because of the likelihood of injury and the long-term environmental effects.⁵⁴ Furthermore, under Rule 65 of the Federal Rules of Civil Procedure (Rules), a “presently existing actual threat” of irreparable injury is adequate for preliminary injunctive relief.⁵⁵

2. Success on the Merits

As to irreparable injury, the moving party has to show only probable success on the merits for a grant of preliminary injunctive relief.⁵⁶ Probable success and possibility of irreparable injury are

51. See *id.* at 531. Alaska National Interest Land Conservation Act provides that:

before allowing the use, occupancy or disposition of public lands that would significantly restrict Alaskan Natives' use of those lands for subsistence, the head of the federal agency having primary jurisdiction over the lands must give notice, conduct a hearing, and determine that the restriction of subsistence uses is necessary and that reasonable steps will be taken to minimize adverse impacts.

Id. (quoting Alaska National Interest Conservation Act, § 810(a)).

52. See *id.* at 545-46 (holding exploratory oil drilling will not cause type of harm that statute at issue was designed to prevent and development of energy resources may be more important).

53. See *id.* (explaining more deference is extended to environment for its protection and irreparable injury requirement thus turns on probability of that harm actually transpiring); see also *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (holding that despite financial burden of injunction to Forest Service, burden is outweighed by fact that old-growth forests, “if cut, take hundreds of years to reproduce”) (citing *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1382 (9th Cir. 1998)).

54. See, e.g., *Idaho*, 222 F.3d at 569 (holding “evidence of environmental harm is sufficient to tip the balance in favor of injunctive relief”); *Amoco*, 480 U.S. at 545 (holding “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable”); *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1196 (9th Cir. 1988) (holding “[t]he balance of harms favors the issuance of an injunction to prevent further irreparable harm to the environment”); *Cuddy Mountain*, 137 F.3d at 1382 (holding “[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce”).

55. See 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE CIV.2d* § 2948.1 (2005) (adding injury need not be certain to occur for preliminary injunctive relief).

56. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003) (holding anything other than “probability” of success on merits is improper legal standard).

essentially two points on a sliding scale in which the degree of injury increases as the probability of success decreases.⁵⁷ A denial of a preliminary injunction is reviewed only for an abuse of discretion and a reviewing court will find an abuse of discretion only when the court applies an improper legal standard or bases its holding on clearly erroneous findings of fact.⁵⁸

B. Administrative Procedure Act

The Administrative Procedure Act (APA) governs judicial review of agency decisions under both NEPA and NFMA and requires that in order for plaintiffs to prevail under APA, they must demonstrate that the Forest Service decision was “arbitrary” and “capricious.”⁵⁹ Under APA, an agency decision is deemed arbitrary and capricious if the agency:

... has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁶⁰

1. The National Environmental Policy Act

In 1969, Congress passed NEPA to establish a national policy for the environment.⁶¹ Congress endorsed NEPA in response to increasing awareness over the critical importance in preserving the environment and in recognition of humankind’s profound impact

57. See *id.* (citing *Arcamuzi v. Cont’l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987)) (emphasizing that if plaintiff shows no success on merits, preliminary injunction should not issue).

58. See *id.* (citing *Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001)) (discussing high threshold for review of grant of preliminary injunctive relief and explaining district court applied improper legal standard when assessing possibility of irreparable harm).

59. See Administrative Procedure Act, 5 U.S.C. § 706(2) (2000) [hereinafter APA] (detailing scope of judicial review for federal agencies).

60. See *O’Keeffe’s, Inc. v. U.S. Consumer Product Safety Comm’n*, 92 F.3d 940, 942 (9th Cir. 1996) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (explaining circumstances where agency decision is arbitrary or capricious).

61. See National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000) (noting NEPA’s intent). The stated purpose of the original 1969 Act was “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man” *Id.*

on the environment.⁶² NEPA has two main purposes: (1) it requires federal agencies to consider all significant aspects of the environmental impact of a proposed action; and (2) it ensures agencies inform the public that they have considered any environmental consequences in making their decision.⁶³ Consequently, federal agencies must prepare an EIS prior to taking any "major federal action" which may significantly affect the environment.⁶⁴ An agency is required only to take a "hard look" at the environmental effects in making this assessment.⁶⁵

If an agency determines that its action will have a significant impact on the environment, the EIS requirement is triggered and the agency must next define the scope of the EIS.⁶⁶ In certain circumstances the agency must consider several actions in a single EIS.⁶⁷ Actions that are considered "connected," "cumulative" or "similar" are to be considered in a single EIS in accordance with section 1508.25 of the Code of Federal Regulations (Regulations).⁶⁸ This section guards against an agency dividing an action into sev-

62. *See id.* (declaring it is national policy of Federal Government, in cooperation with State and local governments and other related agencies and bodies, to do whatever possible to protect environment).

63. *See Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002) (adding NEPA does not contain substantive environmental standards but requires agencies to take "hard look" at environmental consequences).

64. *See id.* at 1067 (citing 42 U.S.C. § 4332(2)(C)) (adding certain actions categorically require EIS; for those that do not, assessment must be made to determine whether proposed project will significantly impact environment). Because NEPA does not explicitly define a "major federal action," there has been disagreement as to the triggering of the EIS requirement; both the Ninth Circuit and the United States Supreme Court, however, have held that the EIS requirement is not prompted if a proposed project does not adversely affect the physical environment. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995) (holding NEPA does not require EIS for actions that preserve environment); *see also Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (noting "NEPA requires an EIS for 'major federal actions significantly affecting the quality of the human environment'"). *See generally Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983) (discussing NEPA requirements are triggered when there is close relationship between environmental change and effect at issue).

65. *See Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1192 (9th Cir. 1988) (holding judgment of agency as to environmental consequences under NEPA claim should be upheld unless unreasonable); *see also Kern*, 284 F.3d at 1066 (stressing NEPA confers only procedural rights; it simply prescribes the necessary process, not substantive environmental standards).

66. For further discussion of NEPA, *see supra* note 61; *see also Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1064 (9th Cir. 1995) (detailing NEPA requirements); *see also Thomas*, 753 F.2d at 758 (detailing scope of EIS).

67. *See* 40 C.F.R. pt. 1508.25 (2005) (explaining actions that should be considered in single EIS); *see also Thomas*, 753 F.2d at 758 (detailing scope of EIS).

68. *See* 40 C.F.R. pt. 1508.25 (explaining requirement of single EIS when actions are "connected," "cumulative" or "similar"). Section 1508.25 states:

eral smaller actions, each of which would have minimal environmental impacts when considered independently, but, when considered together, have a significant effect on the environment.⁶⁹

In *Native Ecosystems Council v. Dombeck*,⁷⁰ the Ninth Circuit held that the Forest Service did not consider the cumulative impacts of certain aspects of a timber sale and thus violated NEPA.⁷¹ In *Native Ecosystems*, the Gallatin National Forest Plan fixed a maximum road density standard for the entire forest.⁷² The Forest Service recognized that the standard would be violated for each of the twelve congressionally-authorized timber sales, and thus recommended a

To determine the scope of environmental impact statements, agencies shall consider 3 types of actions. . . . They include:

- (a) Actions (other than unconnected single actions) which may be:
 - (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
 - (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
 - (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
 - (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Id.

See also *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1304-05 (9th Cir. 2003) (stating single EIS is required for separate projects when projects are "connected," "cumulative" or "similar actions" under NEPA); *Northwest*, 56 F.3d at 1067-68 (detailing impacts to be considered in single EIS).

69. See *Thomas*, 753 F.2d at 758 (noting theory behind single EIS requirement); see also *Northwest*, 56 F.3d at 1068 (explaining rationale behind comprehensive EIS).

70. 304 F.3d 886, 890 (9th Cir. 2002).

71. See *id.* (arguing Forest Service failed to consider cumulative impact of multiple decisions about same element of timber sale). The court also discussed "connected actions," setting out the "independent utility" test applied by the Ninth Circuit. See *id.* at 894. The test states that "[w]here each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." *Id.*

72. See *id.* at 890 (detailing Gallatin National Forest Plan). Road density standard is quantified by a Habitat Effectiveness Index (HEI), which indicates how open roads and motorized trails might affect the habitat of elk. See *id.* The higher the HEI is for a certain area, the fewer roads permitted. See *id.*

road density standard amendment for each timber sale proposal.⁷³ These amendments were considered independently, rather than in one comprehensive EIS.⁷⁴ In reaching its decision, the Ninth Circuit relied on sections 1508.7 and 1508.25 of the Regulations, which together require that when determining the scope of an EIS, the cumulative impact of the amendment at issue must be considered with reasonably foreseeable future amendments.⁷⁵ Consequently, the Ninth Circuit concluded that the Forest Service's failure to consider all "reasonably foreseeable" road density amendments together with the amendment of the timber sale in a single EIS, violated NEPA.⁷⁶

In contrast, the Ninth Circuit determined that the U.S. Army Corps of Engineers (Corps) did not violate NEPA's requirement that "connected," "cumulative" or "similar actions" be considered in a single EIS in *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*.⁷⁷ In *Northwest*, the Corps, who manage the Federal Columbia River Power System (FCRPS), an operation of dams and reservoirs that generate low-cost electricity, implemented measures to assist sockeye salmon in their downstream migrations in response to their classification as an endangered species, and to improve the FCRPS which was found to be a major factor in the decline of the salmon population.⁷⁸ A transportation program was employed which benefited the migration of the salmon, and flow improvement measures were taken which preserved the hydro-power interests that profited from the inexpensive electricity.⁷⁹ The Ninth Circuit found that an ongoing salmon transportation

73. See *id.* at 891 (realizing amendment will effectively alleviate Forest Service of its duty under forest plan).

74. See *id.* at 890 (noting Forest Service's argument that because amendments were spread throughout forest, Forest Service need not consider other road density amendments within timber sale proposal at issue).

75. See *Native Ecosystems*, 304 F.3d at 895 (defining "cumulative impact," according to 40 C.F.R. pt. 1508.7, as "the impact on the environment which results from the incremental impact of the action when added to other past, present or reasonably foreseeable future actions") (emphasis in original). Section 1508.25(c)(3) mandates that "cumulative impact" be considered when determining the scope of an EIS. See 40 C.F.R. pt. 1508.25.

76. See *Native Ecosystems*, 304 F.3d at 896 (explaining reasonably foreseeable requirement coupled with cumulative impact).

77. 56 F.3d 1060, 1068 (9th Cir. 1995) (explaining actions were not "inextricably intertwined" and, thus, not "connected actions").

78. See *id.* at 1063 (admitting that several characteristics of dams, such as blocked habitats, delays in migration and increased predation cause salmon deaths).

79. See *id.* at 1063-64 (describing advantages and disadvantages of methods implemented to assist salmon in their migration).

program and river flow improvement measures were independent — each could exist without the other — and that this case dealt not with “links in the same bit of chain” but “separate segment[s] of chain.”⁸⁰ As such, they were not “connected actions” under NEPA and so were not required to be considered in the same EIS.⁸¹

2. *National Forest Management Act*

In 1976, Congress adopted NFMA, expanding and amending the Forest and Rangeland Renewable Resources Planning Act of 1974, which called for the management of national forests.⁸² NFMA is the principal statute overseeing the administration of national forests.⁸³ Its chief concern is the management of timber harvests.⁸⁴

NFMA provides a two-step process for forest management.⁸⁵ First, NFMA requires the Forest Service to develop a Land Resources Management Plan (or Forest Plan) for each national forest.⁸⁶ Second, it demands that implementation of each plan be “site-specific,” meaning that any activities in the forest, including commercial logging, must be consistent with the established Forest Plan.⁸⁷ In this way, NFMA is different from NEPA because it imposes substantive constraints on the management of the forest.⁸⁸ Congress’ policy is that all forested lands in the National Forest Sys-

80. See *id.* at 1068 (citing *Sylvester v. United States Army Corps of Eng’rs*, 884 F.2d 394, 400 (9th Cir. 1989)) (distinguishing cases with actions considered not “connected”). Moreover, the two actions together would serve to benefit the environment, whereas precedent case law addressed only “connected actions” that had adverse impacts on the environment. See *id.* at 1068-69.

81. See *id.* at 1069 (declaring court’s holding). The court stated, “we cannot agree . . . that the transportation program and the flow improvement measures are so interdependent as parts of the larger action of improving the survival of the salmon that they must be addressed in the same NEPA document.” *Id.*

82. See National Forest Management Act, 16 U.S.C. § 1600 (2000) (requiring Secretary of Agriculture to evaluate forest lands, develop management program based on multiple-use, sustained-yield principles, and implement resource management plan for National Forest System).

83. See NOAA Coastal Services Center: The National Forest Management Act, http://www.csc.noaa.gov/cmfp/reference/National_Forest_Management_Act.htm (last visited Nov. 1, 2004).

84. See NFMA, 16 U.S.C. § 1600 (requiring Forest Service to integrate resources into national forest land use plans and recognizing equal importance of trees and timber product materials).

85. See *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998) (detailing NFMA requirements).

86. See *id.* (explaining first aim of NFMA).

87. See *id.* (detailing second aim of NFMA).

88. See *id.* (providing explanation that NEPA’s EIS requirement is procedural while NFMA imposes substantive requirements). For a discussion of procedural rights conferred by NEPA, see *supra* notes 61-63, 65 and accompanying text.

tem are to be maintained so as to maximize long term public benefits in an environmentally sound manner.⁸⁹

C. Healthy Forest Restoration Act

On December 3, 2003, President George W. Bush signed into law the Healthy Forest Restoration Act (HFRA).⁹⁰ HFRA was designed to reduce the threat of wildfires which have blazed out of control in recent years as a result of poor forest management.⁹¹ Principally, HFRA encourages thinning of the national forests and aims to streamline appeals, public involvement and environmental review in order to ensure a more effective and timely process.⁹²

Environmental groups argue, however, that HFRA is essentially a way to dramatically increase commercial logging.⁹³ Indeed, they assert that timber companies are strong proponents of HFRA.⁹⁴ In fact, Mark E. Rey, President Bush's Undersecretary of Agriculture overseeing the Forest Service, is a former timber lobbyist.⁹⁵ Furthermore, much of the purported changes that went into HFRA

89. See 36 C.F.R. pt. 219.1 (2005) (detailing congressional policy notes).

90. See Healthy Forest Restoration Act, Pub. L. No. 108-148 (2003) [hereinafter HFRA]; see also *President Bush Signs Healthy Forests Restoration Act into Law*, THE WHITE HOUSE, <http://www.whitehouse.gov/infocus/healthyforests/> (last visited Oct. 20, 2004) [hereinafter THE WHITE HOUSE] (asserting that legislation is based on sound science and advances President's Healthy Forests Initiative pledge to protect America's forests). HFRA is the first major forest management legislation in twenty-five years. See Associated Press, *Bush Signs Forest Bill* (Dec. 4, 2003), <http://www.cnn.com/2003/ALLPOLITICS/12/03/forests.initiative.ap/>.

91. See THE WHITE HOUSE, *supra* note 90 (noting 147,049 fires burned almost eleven million acres from 2002 to 2004).

92. See *id.* (detailing HFRA's objectives).

93. See Sean Loughlin, *Experts Disagree on Forest Management: The Devil Is in the Details*, Aug. 22, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/08/22/fire.science/index.html> (discussing Healthy Forest Initiative and indicating that environmentalists find administration's plan will subject excessive federal land to amplified road building and logging); see also Douglas Bevington, *Bush Administration Poised to Assault Our National Forests*, THE LOMA PRIETAN, Feb.-Mar. 2003 (supporting environmentalists' stance that HFRA is "worst assault on our forests"); see also The Bush Administration Environmental Record, CENTER FOR COOPERATIVE RESEARCH, http://www.cooperativeresearch.org/context.jsp?item=the_bush_administration_s_environmental_record_1058 (last visited Oct. 31, 2003) [hereinafter CENTER FOR COOPERATIVE RESEARCH] (explaining conflicts of interest).

94. See Bevington, *supra* note 93 (explaining timber companies applied significant pressure to get HFRA passed); see also CENTER FOR COOPERATIVE RESEARCH, *supra* note 93 (noting HFRA nearly doubles federal budget for forest-thinning projects); see also Loughlin, *supra* note 93 (adding that Ann Camp, a former research scientist with the Forest Service, and currently professor of forestry at the Yale School of Forestry & Environmental Studies in New Haven, Connecticut, also warned that if logging operation is sloppy, branches left behind could contribute to already high level of brush, increasing risk of fire).

95. See Bevington, *supra* note 93 (implying possibility of HFRA's pro-logging slant).

mirror items on a “wish list” offered by Rey’s former employer, the American Forest and Paper Association.⁹⁶

Conversely, proponents of HFRA argue that environmental groups lack the credibility they once enjoyed several years ago.⁹⁷ They theorize that this erosion of public support may be the result of persistent lawsuits and dire warnings of environmental crises, strategies habitually employed by these groups.⁹⁸

IV. NARRATIVE ANALYSIS

A. Preliminary Injunctive Relief

1. Irreparable Injury

The Ninth Circuit addressed whether the denial of a preliminary injunction impeding execution of the Star Fire timber sales was appropriate in *Earth Island Institute v. United States Forest Service*.⁹⁹ Relying on the criteria set out in *Johnson*, the Ninth Circuit held that the lower court applied an improper legal standard in its denial of the preliminary injunction by placing a higher burden of proof on Earth Island than was necessary.¹⁰⁰ *Johnson* established that to obtain a preliminary injunction, plaintiffs must only demonstrate “probable success on the merits and the possibility of irrepa-

96. See *id.* (elaborating that at least eight draft regulations match items on wish list presented in testimony by American Forest and Paper Association).

97. See Michael Milstein, *Activists’ New Cause: Restoring Their Clout*, THE OREGONIAN, Feb. 3, 2005, at A1 (pointing out that environmental groups once dominated national agenda at election times but that focus of national debates has since shifted to more important issues such as Iraq and economy).

98. See *id.* (noting theory that environmental groups have “cried wolf” one too many times, a tactic to which general public has grown wise).

99. 351 F.3d 1291, 1297-98 (9th Cir. 2003) (defining criteria Ninth Circuit established in granting preliminary injunctive relief). In his concurrence, Circuit Judge Noonan expressed his belief that because of its financial interest in the timber sale, the Forest Service should be disqualified from approving the sale of timber. See *id.* at 1309 (Noonan, J., concurring).

100. See *id.* at 1298 (noting court’s holding). The district court found that Earth Island “failed to establish that the project will result in *actual* harm to the California spotted owl as opposed to speculation that some such harm could possibly occur” and that Plaintiff “failed to identify any *concrete* probability of irreparable harm in any other respect” (emphasis added). *Id.* A preliminary injunction requires only that a plaintiff show *probable* success on the merits and a finding of *possible* injury. See *id.* The Supreme Court, however, has held that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Id.* at 1299 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)) (holding “court’s conclusion that Plaintiffs failed to show ‘actual harm’ or a ‘concrete probability of irreparable harm’ constitutes the application of an ‘erroneous legal standard’ and thus ‘necessarily’ an abuse of discretion”) (citation omitted).

rable injury.”¹⁰¹ Yet the district court held that Earth Island needed to show “*actual harm*” and “*concrete probability*” of injury.¹⁰²

The Ninth Circuit determined that the district court abused its discretion by basing its decision on an erroneous legal standard.¹⁰³ Nevertheless, the Ninth Circuit determined that despite this abuse of discretion, remand would not be necessary if Earth Island failed to exhibit a possibility for success on the merits.¹⁰⁴ To make this assessment, the Ninth Circuit turned to the claims advanced by Earth Island alleging the Forest Service’s violation of both NEPA and NFMA.¹⁰⁵

2. *Earth Island’s Probability of Success on the Merits*

a. *Limited Success with NEPA Claims*

Earth Island challenged the EIS advanced by the Forest Service under NEPA on three points: (1) the Forest Service utilized questionable data in creating the Final EIS; (2) the Forest Service should have created one comprehensive EIS for both the Eldorado National Forest and Tahoe National Forest; and (3) the Forest Service should have considered the cumulative impact that Tahoe National Forest’s actions would have on certain animal species.¹⁰⁶

i. *Questionable Data*

Earth Island argued that the Forest Service used “questionable mortality standards” to overestimate the extent of tree destruction, thereby enabling the Forest Service to drop PACs and authorize more extensive logging of larger trees than was permissible under the Framework.¹⁰⁷ Furthermore, in making these determinations,

101. See *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (defining proper preliminary injunctive standard).

102. See *Earth Island*, 351 F.3d at 1298 (indicating district court imposed higher burden on Earth Island for preliminary injunctive relief).

103. See *id.* at 1299 (noting district court employed improper legal standard in assessing irreparable injury).

104. See *id.* at 1299–1300 (explaining district court’s determination that Earth Island failed to show any likelihood of success on its claims must next be analyzed).

105. See *id.* at 1300 (clarifying that if Earth Island showed strong likelihood of success on merits, it would need only make minimal showing of injury to justify preliminary injunction).

106. See *id.* at 1300–06 (setting out three claims Earth Island advanced).

107. See *Earth Island*, 351 F.3d at 1300 (noting Plaintiff’s argument that data relied on by Forest Service classifies large percentage of trees as dead, contradicting vast scientific literature which suggests same trees would survive). Earth Island offered its own expert evidence of many healthy trees on the ground one year after the fire, contrasting the calculations made by the Forest Service that trees with a 65% scorch rate would not survive. See *id.*

the Forest Service discounted other relevant data in order to rely more heavily on its own data.¹⁰⁸ The Ninth Circuit found that the Final EIS discussed the Forest Service's decision, provided all relevant data and reasonable explanations for the exclusion of other data, and directly addressed opposing viewpoints.¹⁰⁹ Accordingly, the Ninth Circuit concluded that the Forest Service did not act arbitrarily and capriciously under NEPA in its determination that logging large trees would reduce potential damage caused by future fire.¹¹⁰

Earth Island also contended however, that the data relied on by the Forest Service was factually incorrect.¹¹¹ In advocating this argument, Earth Island provided expert evidence supporting the existence of much higher numbers of green foliage in contrast to the Final EIS, which found that none existed.¹¹² The Ninth Circuit held that because a claim of factual inaccuracy is different from an attack on the methodology itself, and because the record was insufficient to uphold a finding of factual inaccuracy, the matter must be addressed on remand.¹¹³

108. See *id.* at 1301 (explaining that although agency needs to show proof of its evidence under NEPA to avoid court suspicions of its methodology, agency has wide discretion when evaluating its scientific evidence so long as it takes "hard look" at issues and reacts to opposing views as NEPA requires); see also 40 C.F.R. pt. 1502.9(a)-(b) (2005). Additionally, when contrasting views are advanced, an agency may rely on the opinions of its own experts even if a court finds contrary evidence more persuasive. See *id.* at 1301 (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)) (noting because scientific data requires technical expertise, courts must defer to informed opinion of responsible agency).

109. See *Earth Island*, 351 F.3d at 1301 (finding Forest Service provided data from opposing viewpoints in Final EIS, directly addressed questions about removal process and requested other data but never received it, noting that author of that data informed Forest Service that study was not about post-fire salvage measures).

110. See *id.* For a discussion of the requirements under NEPA, see *supra* notes 61-65 and accompanying text. For a discussion of the APA standard, see *supra* notes 59-60 and accompanying text.

111. See *Earth Island*, 351 F.3d at 1301-02 (explaining regardless of methodology used to interpret data, that data itself did not correspond to reality, which, if true, does more than challenge agency's methodology or conclusion but suggests that agency relied on "factually inaccurate data" or did not utilize methodology they claimed to follow).

112. See *id.* at 1302 (finding Forest Service's expert arrived at "radically different" results from those reported in Final EIS and that timber sale area maps reclassify "severely burned" areas as "cut tree" areas). "Cut tree" areas are only marked when the trees have experienced mild or moderate burns and the logging company may only cut marked trees. See *id.* Thus, Plaintiffs suggest that the Forest Service "implicitly acknowledged a lower burn level." *Id.*

113. See *id.* (noting holding). The court explained, "[a]t this stage, the record does not allow us to conclude that the Forest Service acted arbitrarily and capriciously in relying on its own data and discounting the alternate evidence offered by Plaintiffs." *Id.* The court further noted that if Earth Island can convince

ii. *Comprehensive EIS: Connected, Cumulative or Similar Actions?*

Earth Island claimed that NEPA obligated the Forest Service to prepare a single EIS concerning the Star Fire project and timber sales in both the Eldorado National Forest and neighboring Tahoe National Forest.¹¹⁴ To prevail, Earth Island had to demonstrate that the projects were, in fact, "connected," "cumulative" or "similar" and that the Forest Service acted arbitrarily and capriciously by failing to consider these actions in a single report.¹¹⁵

To determine whether the projects were "connected" for purposes of NEPA review, the Ninth Circuit relied on its "independent utility" test.¹¹⁶ The test states that "where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions."¹¹⁷ Here, because each project alone would fulfill its respective forests' conservation goals, the Ninth Circuit determined that the projects did have independent utility, and as such, were not "connected actions."¹¹⁸

The Ninth Circuit then evaluated whether the actions could be regarded as "cumulative actions."¹¹⁹ Here, the Ninth Circuit found that many of the factors used to determine whether actions are "cu-

the district court of arbitrary and capricious behavior, it may be able to succeed on the merits of this claim. *See id.*

114. *See id.* at 1304 (discussing established law that single EIS is required for separate projects when there is one proposal governing projects or when projects are "connected," "cumulative" or "similar actions" under NEPA) (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002)).

115. *See id.* at 1305 (explaining that although agencies have wide discretion under NEPA, some actions must be reviewed together to preclude projects from being split up, which independently have minor environmental implications, but when considered aggregately, have substantial environmental impact). For a discussion of the APA standard, see *supra* notes 59-60 and accompanying text.

116. *See Earth Island*, 351 F.3d at 1305 (explaining test as when each project transpires without regard to other, projects have independent utility and are not regarded as "connected actions"). For further discussion of the independent utility test, see *supra* note 71.

117. *See Earth Island*, 351 F.3d at 1305 (citing *Native Ecosystems*, 304 F.3d at 894) (describing "independent utility" test).

118. *See id.* (determining each project would generate revenue and fulfill its own forest conservation goal on its own, whether or not other project would proceed). For a discussion of "connected actions," see *supra* notes 68-81 and accompanying text.

119. *See Earth Island*, 351 F.3d at 1305 (explaining single EIS is required for multiple timber sales when sales "formed part of a single timber salvage project, were announced simultaneously, were reasonably foreseeable, and were located in the same watershed") (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998)).

mulative" did not apply.¹²⁰ Thus, the court held the actions were not "cumulative."¹²¹

Next, the Ninth Circuit addressed whether the actions may constitute "similar actions."¹²² The Ninth Circuit agreed that there were many parallels between the two actions, thus concluding that the timber sales were, in fact, "similar actions."¹²³ Despite this finding that the actions were "similar," however, the Ninth Circuit concluded that the Forest Service had not acted arbitrarily in deciding that two separate impact statements constituted "the best way to assess adequately the combined impacts of similar actions."¹²⁴

iii. Cumulative Impact on Animal Species

Earth Island maintained that even if a single EIS was not required for the timber sales of both forests, the Forest Service nevertheless failed to consider any foreseeable cumulative environmental impact on the California spotted owl caused by actions taken in Tahoe National Forest.¹²⁵ Specifically, Earth Island argued the Final EIS failed to consider any cumulative impact from Tahoe's

120. *See id.* (explaining boundary between sale areas was determined prior to Forest Service decision, sales and analyses were on distinctive time schedules and record did not intimate that Forest Service intended to segment projects to minimize environmental impacts). To the contrary, the Final EIS explicitly addressed impacts of comparable conservation plan in Tahoe National Forest. *See id.*

121. *See id.* (distinguishing that although regulations may support conclusion that projects are "cumulative actions," Forest Service did not act arbitrarily and capriciously in its decision not to prepare single EIS). For a discussion of "cumulative actions," see *supra* notes 68-81 and accompanying text.

122. *See Earth Island*, 351 F.3d at 1305-06 (establishing "similar actions" as "actions which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography") (quoting 40 C.F.R. pt. 1508.25(a)(3) (2004)). For further discussion of "similar actions," see *supra* notes 68-81 and accompanying text.

123. *See Earth Island*, 351 F.3d at 1305-06 (explaining similarities in underlying cause, proposed solution and general geography contribute to determination that actions are "similar"); *supra* note 68.

124. *See Earth Island*, 351 F.3d at 1305-06 (holding Plaintiff's insistence that "similar" actions *must* be considered together in one EIS is inaccurate). Relying on statutory interpretation, the court concluded that the language allows more deference in that an agency *may* wish to address projects under one EIS but is not bound to do so, and, in this instance, the Forest Service may have determined that two separate EIS reports were more effective than a single EIS report. *See id.*; see also 40 C.F.R. pt. 1508.25(a)(3).

125. *See Earth Island*, 351 F.3d at 1306 (clarifying that cumulative impact involves "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency . . . or person undertakes such other actions") (quoting 40 C.F.R. pt. 1508.7).

PAC075.¹²⁶ Because of the close proximity of Tahoe's protected owl territory PAC075 to the Eldorado Forest line, the Ninth Circuit concluded it was "reasonably foreseeable" that Eldorado's PAC would play a vital role in supporting Tahoe's PAC and that the failure of the Forest Service to consider this impact when it dropped its PAC amounted to an "insufficient consideration of cumulative impact under NEPA."¹²⁷

b. Likelihood of Success with NFMA Claims

i. Tree Diameter

Earth Island claimed the Forest Service violated NFMA when it decided to permit logging of trees over twenty inches in diameter, and drop PAC055 and PAC075 without later readjusting the boundaries of these PACs.¹²⁸ Earth Island argued that the twenty-inch limitation should apply only to areas with mild to moderate burn levels, despite the explanation by the Forest Service that the limitation applied to undergrowth thinning and not salvage logging after a fire.¹²⁹ The Ninth Circuit rejected this claim, asserting that noth-

126. *See id.* at 1306-07 (arguing spotted owls depend on HRCAs surrounding PACs and, thus, destruction of HRCAs in Eldorado National Forest may impact those owls inhabiting PAC075 within Tahoe forest boundaries). Furthermore, the Final EIS only mentioned cumulative impacts on two occasions and both times the Final EIS assumed Tahoe PAC075 would also be removed due to unsuitable standards. *See id.* at 1307. Yet, due to the discovery of the owl pair, Tahoe National Forest decided not to de-list its PAC075. *See id.*

127. *See id.* at 1307 (explaining because Sierra Nevada Framework permits de-listing of owl PAC only when area is deemed unsuitable due to catastrophic stand-replacing event and surveys confirm non-occupancy, and because Forest Service, in its own survey, discovered presence of owl pair, it could have been reasonably foreseen that Tahoe would not de-list PAC075). *See id.* at 1310-15 (Clifton, J., dissenting). Of the majority's major arguments, the dissent took issue with two of them. *See id.* The dissent argued that the district court applied the correct standard when assessing irreparable injury, despite using "slightly different words" in its assessment. *See id.* at 1311 (Clifton, J., dissenting) (clarifying that language used by district court was "intended to emphasize that Plaintiffs did not persuade it that the chance or probability of actual harm—as opposed to something speculative—was sufficient to tip the balance in favor of granting the requested preliminary injunction"). In addition, the dissent disagreed that the Forest Service should have reasonably foreseen that Tahoe would not de-list its PAC075, because one agency can not predict the actions of another. *See id.* at 1314-15 (Clifton, J., dissenting) (rejecting majority's argument that because forests share border, cumulative impact of reasonably foreseeable actions should have been considered and submitting that argument is not actually about Tahoe's de-listing of PAC075, but instead is criticism of Eldorado's de-listing of its PAC075 because of discovery of owl pair).

128. *See id.* at 1302 (arguing three separate Forest Service decisions violate NFMA). For a discussion of NFMA, see *supra* notes 82-89 and accompanying text.

129. *See Earth Island*, 351 F.3d at 1302 (explaining that although Star Fire Plan allows some logging of larger trees, it does not establish violation of Framework).

ing in the Framework indicated the diameter limitation must be maintained in specific areas of the forest.¹³⁰

ii. *Maintenance of PAC055 and PAC075*

Additionally, Earth Island argued that the Forest Service failed to maintain PAC055 and PAC075.¹³¹ The Framework agreement requires PAC maintenance despite occupancy status of the California spotted owl, unless the area becomes uninhabitable as the result of a “catastrophic stand-replacing event” and surveys confirm the spotted owl’s non-occupancy.¹³² To demonstrate probability of success on this claim, Earth Island had to show that the Forest Service failed to meet both requirements.¹³³ The Ninth Circuit found that although the Forest Service provided a plausible explanation for characterizing the Star Fire as a catastrophic stand-replacing event, Earth Island raised a legitimate concern about whether the agency could meet the second requirement.¹³⁴ The Forest Service countered that surveys were unnecessary following such intense fire destruction because the prospect of owl population occupancy in such an area is extremely low as a result of the fire.¹³⁵ Yet, the Ninth Circuit pointed out that the surveys are intended to determine this very fact; the Forest Service’s treatment of the surveys as unnecessary allowed the Forest Service to de-list the PAC while ignoring contrary information about owl occupancy, namely that an owl pair had been found.¹³⁶ As a result, the Ninth Circuit held that the Forest Service did not comply with the Framework agreement and, thus, violated NFMA.¹³⁷

130. See *id.* at 1302-03 (concluding that limitation need not be maintained under Sierra Nevada Framework when twenty-inch limitation had been lifted in some portions of same area of forest and Forest Service has composed comprehensive plan for entire area).

131. See *id.* at 1303 (arguing that Forest Service violated Framework agreement).

132. See *id.* (holding that both criteria must be met in order to succeed on merits of claim).

133. See *id.* (setting out test for PAC claims).

134. See *Earth Island*, 351 F.3d at 1303 (explaining Forest Service relied heavily on its evidence of dead or dying trees in area to justify why habitat was unsuitable for spotted owl, but that surveys did not confirm non-occupancy of owl population; rather, results discovered owl pair).

135. See *id.* at 1303-04 (directing court to information from its website, Forest Service explained of high likelihood that owls will simply relocate).

136. See *id.* (adding further that because Forest Service found some remaining green within disputed PACs, need for surveys was warranted in any case).

137. See *id.* at 1304 (explaining Forest Service’s decision can be invalidated if “the scheme is plainly erroneous or inconsistent with the forest plan”) (citing *Forest Guardians v. United States Forest Serv.*, 329 F.3d 1089, 1098 (9th Cir. 2003)).

V. CRITICAL ANALYSIS

A. Improper Legal Standard of Irreparable Injury

The Ninth Circuit was correct to conclude that the district court applied an improper legal standard in denying injunction when it found that Earth Island "failed to establish that the project will result in *actual* harm to the California spotted owl" and "failed to identify any *concrete* probability of irreparable harm in any other respect."¹³⁸ In granting preliminary injunctive relief, the Ninth Circuit relied upon alternative criteria rather than the traditional criteria.¹³⁹ Under the alternative criteria, Earth Island needed to show a combination of probable success on the merits *and* the possibility of irreparable injury, as *Johnson* established.¹⁴⁰ The higher standard relied on by the district court substantially increased Earth Island's burden in proving the "possibility of irreparable injury."¹⁴¹ The proper standard for preliminary injunctive relief, regardless of whether the traditional or alternative criteria apply, only requires a showing of *probable* success on the merits and a *possibility* of irreparable injury.¹⁴²

Moreover, in an effort to protect the environment, courts have consistently found that Forest Service logging plans alone can fulfill the irreparable injury requirement.¹⁴³ In fact, the *Amoco* court contemplated this very type of injury when it declared "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."¹⁴⁴ Additionally, the Rules establish that a

138. See *id.* at 1310-11 (Clifton, J., dissenting) (contending district court properly set forth both sets of criteria for preliminary injunctive relief and that discrepancy amounted to semantic argument). See *id.* For a discussion of the dissent's main arguments, see *supra* note 127.

139. For a discussion of criteria for preliminary injunctive relief, see *supra* notes 46-49 and accompanying text.

140. See *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (describing alternative set of criteria for preliminary injunctive relief).

141. See *Earth Island*, 351 F.3d at 1298 (explaining that district court's interpretation of standard placed higher burden on Earth Island than was required for grant of preliminary injunction).

142. For a discussion of criteria for preliminary injunctive relief, see *supra* notes 46-49 and accompanying text.

143. See *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (holding impending and ongoing logging activities presented "evidence of environmental harm . . . sufficient to tip the balance in favor of injunctive relief"); see also *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1382 (9th Cir. 1998) (holding "[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce").

144. See *Earth Island*, 351 F.3d at 1299 (citing *Amoco*, 480 U.S. at 545) (promoting policy that environment demands more protection).

preliminary injunction should be issued when threat of injury is likely.¹⁴⁵ The district court failed to consider the deference afforded to environmental protection when it applied a stricter standard for irreparable injury.¹⁴⁶ Thus, the Ninth Circuit appropriately concluded that the district court applied an improper legal standard in its assessment of irreparable injury.¹⁴⁷

B. Success on the Merits

1. *Comprehensive EIS: Similar Actions?*

The Ninth Circuit failed to follow its own precedent when it held that the Star Fire restoration projects and timber sales in both the Eldorado and Tahoe National Forests need not be considered in a single EIS, despite the Ninth Circuit's own finding that they were "similar actions."¹⁴⁸ In *Northwest*, the Ninth Circuit held "an agency is required to consider more than one action in a single EIS if they are 'connected actions,' 'cumulative actions' or 'similar actions.'"¹⁴⁹ The Ninth Circuit reaffirmed this decision in *Native Ecosystems* when it asserted that "connected, cumulative and similar actions *must* be considered together."¹⁵⁰

In its holding in *Earth Island*, the Ninth Circuit decided the requirements for "similar actions" were not as rigorous as those for "connected" or "cumulative actions."¹⁵¹ The Ninth Circuit compared the language in the Regulations for "connected" and "cumu-

145. See WRIGHT & MILLER, *supra* note 55 (noting threat of injury is adequate for grant of preliminary injunction).

146. See *Earth Island*, 351 F.3d at 1299 (noting Circuit Court has often held commercial logging plans may satisfy irreparable injury criterion because of their long term environmental consequences); see also *supra* note 54 and accompanying text.

147. See *Earth Island*, 351 F.3d at 1298 (holding "actual harm" and "concrete probability" both place higher burden on *Earth Island* than "possibility" of injury).

148. See *id.* at 1306 (holding Forest Service may have reasonably concluded two separate impact statements constituted best way to assess effect of "similar actions").

149. See *Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1064 (9th Cir. 1995) (relying on interpretation of Code of Federal Regulations in its finding); see also 40 C.F.R. pt. 1508.25 (defining "connected," "cumulative" and "similar actions"). Section 1508.25 states that a single EIS is required for similar actions when "the best way to assess adequately the combined impacts of similar actions . . . is to treat them in a single impact statement." 40 C.F.R. pt. 1508.25(a)(3). For a discussion of "connected," "cumulative" and "similar actions," see *supra* notes 68-81 and accompanying text.

150. See *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002) (making similar argument as did *Earth Island* that "similar actions" must be considered in single EIS).

151. See *Earth Island*, 351 F.3d at 1306 (suggesting Regulations imply agency has more deference for "similar actions").

lative actions" with the language concerning "similar actions;" the former states that they both *should* be considered in a single EIS, while the latter states only that an agency *may wish* to consider "similar actions" in a single EIS.¹⁵² The court therefore decided "similar actions" need not be assessed in a comprehensive EIS.¹⁵³ With this sudden change of conviction, the Ninth Circuit reinforced its decision by asserting that because neither *Northwest* nor *Native Ecosystems* actually involved a specific claim about "similar actions," it had been unnecessary for the court to analyze the specific language in the Regulations governing "similar actions."¹⁵⁴ Consequently, in the immediate case, the Ninth Circuit felt justified holding that "similar actions" were not required to be considered in a single EIS after actually analyzing the plain language in the Regulations, despite holding otherwise in previous cases.¹⁵⁵

The Ninth Circuit further bolstered this holding by relying on the informed discretion of the agency.¹⁵⁶ Accordingly, the Ninth Circuit did not explore whether it would be better to consider the conceded "similar actions" in a single EIS; rather, the court simply advanced that the agency knew best because of the technical analysis and expertise necessary to make this type of decision and, therefore, the agency's decision was reasonable.¹⁵⁷ The court appeared to shirk its responsibility by deferring to the discretion of the agency rather than confronting its own precedent concerning "similar actions," especially because the court confirmed that "the many similarities in underlying cause, proposed solution, and general geography place the post-fire sales in the Tahoe and Eldorado National Forests into this category [of 'similar actions']."¹⁵⁸

152. *See id.* (noting semantic differences).

153. *See id.* (comparing different sections of Regulations regarding "connected actions," "cumulative actions" and "similar actions").

154. *See id.* (emphasizing "[n]either case actually involved a claim about 'similar actions,' nor did either decision analyze that particular regulatory provision").

155. *See id.* (finding specific language governing "similar actions" afforded more discretion than for "connected" or "cumulative actions").

156. For a discussion of the rationale behind court's conclusion, see *supra* note 108.

157. *See Earth Island*, 351 F.3d at 1306 (determining that after contrasting "the clear language of the [R]egulations with the isolated sentence contained in two cases that do not discuss 'similar' actions," court was compelled to conclude that agency did not act arbitrarily).

158. *See id.* at 1305-06 (finding post-fire sales in both forests are "similar actions").

2. *Foreseeable Actions in Tahoe National Forest*

The majority concluded that both the Forest Service and the district court failed to anticipate an element of the Tahoe National Forest Plan and, therefore, did not consider the cumulative impact of foreseeable actions.¹⁵⁹ Because the two parks share a border, the Ninth Circuit asserted that it was reasonable for the Forest Service to consider the potential impact of Tahoe's restoration plan on Eldorado.¹⁶⁰ Section 1508.7 of the Regulations requires analysis of cumulative impacts of proposed actions together with reasonably foreseeable future actions.¹⁶¹ Accordingly, the Eldorado Forest Service had a responsibility to investigate the incremental impacts of Tahoe's Forest Plan on its own, especially upon the discovery of an owl pair in the adjoining PACs between the two parks.¹⁶² Contrary to the dissent, the majority correctly followed the established principle that for past, present and reasonably foreseeable actions, the Forest Service is obligated to assess their cumulative impacts.¹⁶³ The Ninth Circuit discussed this principle in *Native Ecosystems*.¹⁶⁴ In that case, although the Forest Service addressed cumulative impact in its Final EIS, it did not specifically address the cumulative impact of the road density amendments and, therefore, did not give "adequate consideration of cumulative effects."¹⁶⁵

Here, the Forest Service *assumed* the Tahoe National Forest had removed its PAC075, despite the discovery of an owl pair.¹⁶⁶ Consequently, the Forest Service only considered the cumulative impact of the removal of its PAC075 in conjunction with Tahoe's

159. *See id.* at 1306 (clarifying cumulative impact involves "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency . . . or person undertakes such other actions") (quoting 40 C.F.R. pt. 1508.7).

160. *See id.* at 1314 (Clifton, J., dissenting) (acknowledging that actions concerning Tahoe plan were "assumed" based on preliminary plan, with no further inquisition).

161. For a discussion of "cumulative impacts," *see supra* note 125 and accompanying text.

162. *See Earth Island*, 351 F.3d at 1307 (restating majority's argument).

163. *See id.* at 1314 (Clifton, J., dissenting) (rejecting majority's conclusion that Forest Service should have foreseen Tahoe "would not—indeed could not—de-list PAC075").

164. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002). "NEPA always requires that an environmental analysis for a single project consider cumulative impacts of that project together with 'past, present and reasonably foreseeable future actions.'" *Id.*

165. *See id.* at 896 (describing need for cumulative impacts to be addressed fully in environmental assessments to determine whether EIS trigger is prompted).

166. *See Earth Island*, 351 F.3d at 1307 (criticizing Forest Service for its assumption that Tahoe PAC075 had been dropped).

removal of Tahoe's PAC075, and failed to consider the cumulative impact of the removal of its PAC075 in conjunction with Tahoe's possible *preservation* of Tahoe's PAC075.¹⁶⁷ The Forest Service did not address the cumulative impacts together with all possible combinations of foreseeable actions, thereby violating the requirement that the Forest Service give "adequate consideration of cumulative impacts."¹⁶⁸ As a result, the Ninth Circuit suitably held that the Forest Service's Final EIS insufficiently considered the cumulative impacts of Tahoe's Forest Plan.¹⁶⁹

VI. IMPACT

The policy underlying NEPA was furthered as a result of the Ninth Circuit's decision in *Earth Island* because the holding "promote[d] efforts which will prevent or eliminate damage to the environment" and, in ruling, the Ninth Circuit also protected the policy advanced under NEPA to do "whatever possible to protect the environment."¹⁷⁰ By upholding that policy and granting preliminary injunctive relief, the Ninth Circuit maintained that the environment necessitates great protection.¹⁷¹

The Ninth Circuit's finding that "similar actions" need not be considered in a single EIS, however, may have a profound effect on future litigation.¹⁷² Case law previously established that "similar actions," like "connected" and "cumulative actions," should be considered in one comprehensive EIS.¹⁷³ Here, because the court distinguished "similar actions" from "connected" and "cumulative actions," this decision may afford future "similar actions" to proceed with less delay, and may also result in greater detriment to the

167. *See id.* at 1308 n.12 (noting worst case scenario was to assume Tahoe would not de-list its PAC despite Forest Service's argument that worst case scenario was to assume Tahoe PAC would also be de-listed).

168. *See id.* at 1308 (stating court's holding that Final EIS did not sufficiently consider cumulative impacts of Star Fire sale).

169. *See id.* (explaining agency could have reasonably anticipated that Tahoe forest would be required to maintain its PAC).

170. For a discussion about NEPA policy, see *supra* notes 61-62 and accompanying text.

171. *See Earth Island*, 351 F.3d at 1308 (holding *Earth Island* demonstrated reasonable probability of success on merits of certain claims, and district court applied improper legal standard of irreparable injury).

172. For a discussion of the court's holding that "similar actions" need not be considered in a single EIS, see *supra* notes 122-24 and accompanying text.

173. For a discussion concerning the requirement of a single EIS, see *supra* notes 149-51 and accompanying text.

environment.¹⁷⁴ By permitting EIS reports to have a narrower scope, potential damage to the environment may go unrealized until after several “similar actions” have commenced and the injury already sustained.¹⁷⁵

In addition, the *Earth Island* decision came about as President George W. Bush signed HFRA into law.¹⁷⁶ Though HFRA seeks to protect our national forests, environmental groups have charged that it intends to do the exact opposite of what its name implies by enabling significant increases in commercial logging.¹⁷⁷ Proponents of HFRA argue, however, that logging has decreased under the Bush Administration as compared to the final years of the Clinton Administration—an Administration viewed as environmentally-friendly.¹⁷⁸ Yet, in 2004, the Bush Administration sold twenty-four percent more national forest timber than did the Clinton Administration in its last year, so more will be accessible for logging in forthcoming years.¹⁷⁹ Furthermore, because HFRA’s purpose is to streamline measures, it may, in effect, pressure courts to handle legal challenges to logging proposals on an expedited basis which, critics contend, increases the potential for irreparable injury to the environment.¹⁸⁰

Nevertheless, by overturning the district court’s denial of a preliminary injunction, the *Earth Island* court expressed its preference to act with caution when handling controversies surrounding the fragile environment.¹⁸¹ Despite attempts to protect and restore national forests in courts and through legislation, there still exists a

174. See *Earth Island*, 351 F.3d at 1304-05 (explaining single EIS is required for individual projects when projects are “connected,” “cumulative” or “similar actions” in order to prevent agency from segmenting larger projects into multiple projects with comparatively insignificant environmental impacts, but which collectively have substantial impacts).

175. See *id.* (describing risk of analyzing “connected,” “cumulative” or “similar actions” in separate EIS reports).

176. For a discussion about the timing of HFRA, see *supra* note 90 and accompanying text.

177. For a discussion of environmental groups’ arguments, see *supra* notes 93-96 and accompanying text.

178. See Milstein, *supra* note 97 (rebutting accusations that Bush Administration has pillaged national forests).

179. See *id.* (observing environmental groups may be justified when they “vilify George W. Bush”).

180. For a discussion about the objectives of HFRA, see *supra* notes 90-92 and accompanying text.

181. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1299 (9th Cir. 2003) (holding Supreme Court has also recognized that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of

healthy tension between the Forest Service and environmental groups over how best to manage our forest lands ensuring a flood of litigation for years to come.¹⁸²

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an injunction to protect the environment") (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

182. For a discussion about ongoing tension between environmental groups and Forest Service, see *supra* notes 2-6 and accompanying text.